

ACCOUNT ADMINISTRATION: EMPLOYEE BENEFIT ACCOUNTS

Employee benefit trusts are specialized accounts established in accordance with provisions of the Internal Revenue Code as tax exempt plans to administer the funds contributed for employees' retirement income or welfare. A bank may be called upon to serve these trusts as trustee, co-trustee, agent, custodian or depository. On occasion the bank may also perform administrative functions under the plan as distinguished from its normal trustee functions. The duties of the bank with respect to an employee benefit account depend upon the relationship accepted and the respective provisions of the plan and/or its companion trust document.

Employee benefit plans are diverse, varying according to the types of benefits provided, the manner in which plan assets are administered and the manner of determining the amounts of benefits to be provided the employees/participants and their beneficiaries.

Employee benefit plans are classified according to the type of benefit provided; retirement income, health, vacation, education or other benefits. Plans providing retirement income are most often pension plans or profit-sharing plans. Those providing other benefits are grouped together as welfare plans.

The Employee Retirement Income Security Act of 1974 (ERISA) defines employee benefit plans in the following terms:

Pension Benefit Plan -- "... the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

- (i) Provides retirement income to employees, or
- (ii) Results in a deferral of income by employees for period extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the

plan or the method of distributing benefits from the plan."

Welfare Benefit Plan -- "The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 302(c) of the Labor Management Relations Act, 1947, (other than pensions on retirement or death, and insurance to provide such pensions)."

A. PENSION BENEFIT PLAN TRUSTS

These accounts fall into two primary categories: Defined Benefit Plans which provide definitely determinable benefits; and Defined Contribution Plans (individual account plans) which are pension or profit-sharing plans that provide for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures by other participants which may be allocated to such participant's account.

Pension plan benefits are generally paid out in the form of a life annuity beginning at the participant's normal retirement date. Other methods, of paying benefits are installment payments and lump sum distributions, with options sometimes given to the participant. The retirement benefits paid under both defined benefit and defined contribution plans can be integrated with Social Security retirement benefits. In practice, most defined benefit plans are integrated, while only some defined contribution plans are integrated. Internal Revenue Service regulations governing the integration of Social Security benefits are complex and designed to prevent discrimination in favor of highly paid employees.

In general, ERISA requires that all assets of employee benefit plans be held in trust. Exemptions exist for fully insured plans and regulations provide that welfare plans under which benefits are paid directly from the general assets of the employer (unfunded plans) are exempt from the trust requirements. Insured plans and regulations provide that welfare plans under which benefits are paid directly from the general assets of the employer (unfunded plans) are exempt from the trust requirements. Insured plans are those where the funding agency is an insurance company. Contributions are paid to the insurer which in turn pays all benefits to eligible participants based upon instructions from the plan's retirement or administrative committee. These plans range from fully guaranteed retirement benefits to immediate participation guarantee contracts in which the basic guarantee is limited to providing lifetime annuities for those employees who have actually retire.

Trusteed plans are those most frequently encountered and a trust agreement, as distinguished from the governing plan, establishes the trustee's duties and responsibilities. Principal among these, the trustee holds title to and takes possession of account assets. The trustee is also responsible for safekeeping and asset management, to the extent this is not delegated to others. Other typical trust agreement provisions relate to irrevocability and nondiversion of trust assets as well as investment powers of the trustee, payment of legal and other fees, periodic reports by the trustee, records and accounts to be maintained, payment of benefits, and the rights and duties of a trustee in case of amendments to or termination of the plan.

Defined Benefit Plans are established by an employer to provide benefits for retired or disabled employees, with or without contribution by the employees. Contributions to such plans by the employer are based on actuarial calculations designed to project the amounts necessary to fund the payment of specified benefits to participants at retirement. Defined benefit plans are subject to the participation, vesting, reporting, employee disclosure, minimum funding, actuarial reporting, termination insurance, and fiduciary responsibility provisions of ERISA.

Defined Contribution Plans are funded at a rate of contribution that is either fixed, usually as a percentage of an eligible employee's earnings or as a percentage of profits, or determined on a discretionary basis by the sponsor's board of directors. The employer's contribution, together with any employee's contribution if it is a contributory plan, and the employee's share in the investment experience of the plan, provide the eventual retirement income or other benefits. The amount that can be accumulated by retirement depends upon length of service, the amount of employer and/or employee contributions and the investment experience of the plan. The cost of a given amount of a retirement annuity will vary according to such factors as age, sex and normal retirement date. In such plans it is not possible to predict with certainty the amount of retirement income a participant will receive since the amount is not fixed by the plan. Defined contribution plans are subject to the participation, reporting, vesting, employee disclosure and fiduciary responsibility provisions of ERISA. In general, there are five basic types of plans or formulas for defined contribution plans.

(1) Profit Sharing Plans -- Employer's contributions are determined based upon a predefined formula or at the discretion of the board of directors of the employer. Generally, contributions are allocated to participants in proportion to their compensation with subsequent allocations reflecting future contributions adjusted by the investment experience of the plan.

(2) Money Purchase Plans -- Employer's contributions are determined based upon a percentage of compensation for specific individuals. As with the profit sharing plan, contributions are allocated to the participants and the benefits for each participant are derived from the amounts contributed to each account.

(3) Target Benefit Plans -- Employer's contributions to each participant's account are established at a level based upon an actuarial evaluation sufficient to provide a "target" benefit to each participant upon retirement. The plan does not guarantee that the target benefit will be paid; its only obligation is to pay whatever can be provided by the amount in the participant's account depending on the actual investment results achieved by the fund.

(4) **Stock Bonus Plans, Employee Stock Ownership Plans (ESOP's), and Tax Reduction Act Stock Ownership Plans (TRASOP's)** -- (a) Stock Bonus Plans are usually established to permit employees to share in the ownership of the business and/or to reward meritorious service. Contributions, as with ESOP's and TRASOP's, are not necessarily dependent upon profits and the benefits are distributable in stock of the employer company. (b) ESOP's and TRASOP's provide benefits similar to those of a profit-sharing plan, however, contributions are not necessarily dependent upon the employer generating a profit from its business activities. The Internal Revenue Code contains incentives designed to encourage corporate employers to establish such plans. One of these is tax credits for the employer, another is a provision for the leveraged purchase of employer securities by the ESOP/TRASOP coupled with relief from various provisions of ERISA. Under both Internal Revenue Service and Department of Labor regulations, a plan constitutes an ESOP only if it specifically states it is designed to invest primarily in qualifying employer securities, as defined. An ESOP is not subject to the minimum funding standards, and insurance of plan benefits by the Pension Benefit Guaranty Corporation is not required. Such plans are free from the diversification of investment requirements applicable to other types of defined contribution and defined benefit plans under ERISA. ESOP's and TRASOP's are also subject to complex Internal Revenue Code provisions and Internal Revenue Service regulations. Employer contributions to these plans as with other plans, are tax deductible for the employer subject to Internal Revenue Code limitations on contributed amounts. Although the Internal Revenue Code permits distributions of benefits to participants in ESOP's, such distributions will normally be in the form of employer securities. The entire amount of any net unrealized appreciation in employer securities accruing between the time credited to a participant's account and the time of distribution is excludable from income if the distribution is lump sum. The excluded unrealized appreciation receives long-term capital gain treatment on the participant's account and the time of distribution is excludable from income if the distribution is lump sum. The excluded unrealized appreciation receives long-term capital gain treatment on the participant's income tax return when realized in a subsequent sale or exchange, without regard to the post-distribution holding period. Because of

the specialized character of these types of plan, examiner familiarity with their characteristics as well as the controlling Internal Revenue Service and Department of Labor regulations is required in order to appropriately assess the trustee's performance and administration of these accounts.

(5) **Thrift and Savings Plans** an employer sponsored and permit the employee to make contributions within specified ranges, usually a percentage of pay and normally at the participant's choice as to amount within the stated ranges. The employer's contribution is then related to the amount or rate of the participant's contributions. These plans are frequently more liberal than other employee benefit plans inasmuch as they allow vesting at a faster rate, allow for withdrawal of the employee's contribution, are more liberal with respect to disability, and provide that all benefits are available to beneficiaries of the employee upon death.

Cash or Deferred Profit Sharing or Stock Bonus Plans. The Revenue Act of 1978 added Internal Revenue Code Sections 401(k) and 402(a)(8), effective for taxable years beginning after December 31, 1979. These Sections permit employers to establish tax-qualified cash or deferred profit sharing or stock bonus plans. Under such plans, the employee is given a choice of receiving cash, making a contribution or having one made by the employer to a profit sharing or stock bonus and deferring taxes on the amount contributed. The plan may be in the form of a salary reduction agreement that affords the employee with an opportunity to elect to reduce his or her current compensation or to forego a raise, and to have the amounts foregone contributed to the plan on his or her behalf. It is this feature of such plans that makes them attractive to employers in that the plan may be operated without cost (contributions) to the employer.

B. WELFARE BENEFIT PLANS

The more common types of employee welfare benefit plans and the related benefits are: (1) **Health Plans** which provide for hospital expenses, diagnostic X-ray and laboratory fees, surgical and medical fees, medicine and drugs,

major medical insurance, life insurance, and accidental death and dismemberment benefits. Such plans may also provide for dental care, visual care, psychiatric care, and preventive medical examinations; (2) Disability Plans which normally provide benefits during periods of inability to work because of physical incapacity from illness or injury; (3) Vacation and Holiday Plans which provide cash benefits to cover time off for vacation purposes; and (4) Apprenticeship, Educational and Similar Plans which provide funds for retraining individuals in the event of termination of a job in a particular industry, provide an opportunity to expand skills to improve job performance, or take on new responsibilities within or outside of the company.

Most single-employer welfare plans are either insured plans or unfunded plans. The insured plans typically provide medical and/or life insurance. The unfunded benefit plans that are typical for most single employers are vacation and sick leave plans. The establishment of a single trust to which contributions are made and from which benefits are paid normally involves multi-employer plans. Occasionally larger corporations may provide medical and life benefits on a self-insured basis. In these instances a trust to which annual contributions are made may be established.

Voluntary Employees' Beneficiary Associations. Sudden growth in the variety of employee benefit programs has created a demand for innovative and flexible vehicles to provide these benefits. One such vehicle designed to provide certain benefits, e.g., life, sick, accident and others, is the Voluntary Employees' Beneficiary Association (VEBA). Rising costs of life, sick and accident, and similar benefits push them further from the reach of the individual worker, forcing him to turn to group programs in order to meet his needs at a cost which he can still afford.

A VEBA; an organization exempt from income tax under Internal Revenue Code Section 501(c)(9); can provide benefits to its employee members, their dependents and beneficiaries. In addition to tax-exempt status, other tax advantages (such as deductibility of employer contributions and the exclusion of certain benefits from income of the beneficiaries) are available in conjunction with a VEBA. These advantages are not, however, unconditional; they are predicated upon

compliance with a variety of restrictions upon the creation and operation of the plan, including limitations on who may participate, what benefits may be provided, and the manner in which the program is administered.

A VEBA can provide either cash or noncash benefits to members, their dependents or beneficiaries. A "life benefit" can be provided directly or through insurance; however, the term does not include a pension, annuity or similar benefit. "Sick and accident benefits" includes either direct cash reimbursements of medical expenses or income-maintenance payments during illness. Such benefits can be provided directly by the trust, or indirectly by payment of premiums to an insurer, medical clinic or other program for members and their dependents. "Other benefits" include vacation-benefit programs, recreational-activity subsidies, job readjustment allowances, childcare facilities for preschool and school age dependents, supplemental unemployment compensation benefits, education benefits or courses, and temporary living expense loans and grants at times of disaster. "Other benefits" do not include commuting expense payments, accident or home-owner's insurance benefits for property damage, malpractice insurance, loans to members except in times of distress, or savings a facilities for members.

Cash and noncash benefits from a qualified VEBA trust are generally includable in the recipients' gross income for tax purposes subject, however, to certain exclusions. Disability benefits are excludable from employees' income to the extent provided by the Internal Revenue Code. Medical benefits would generally be tax free under the same provisions, and group term life insurance purchased by the VEBA trust would be tax free to the beneficiary when proceeds are paid by the insurer. In instances where plan distributions must be reported by the employee as income for tax purposes, it may be incumbent upon the trustee to provide proper notices to the employee and the Internal Revenue Service. Documentation of Section 501(c)(9) trusts being serviced by the trust department should be consistent with the minimum standards described previously.

Because of the familiarity with group insurance programs providing welfare benefits and the relatively small number of trustee welfare

benefits plans, they will not frequently be encountered in trust departments. However, trustee welfare benefit plans are subject to the various provisions of ERISA in the same manner as pension benefit plans. Thus, when encountered in trust departments there must be a plan and trust document which defines the manner of contribution, provides the basis for payment of benefits, and describes the manner in which such plan funds are to be invested.

C. SELF-EMPLOYED RETIREMENT TRUSTS

Self-employed individuals are permitted to establish qualified (tax exempt and tax deferred) pension and profit sharing plans for themselves and their employees. Such trust are normally designated as HR-10 or Keogh Act Plans or Trusts. There are specific provisions in the Internal Revenue Code prescribing the amounts that may be contributed for owner-employees and that contributions on behalf of common law employees be made on the same percentage of compensation as for owner-employees. Recent tax law changes have the general effect of making these plans comparable to corporate-sponsored plans. A bank may serve as a trustee or custodian for HR-10 Plans. As trustee, the bank's responsibilities will be governed by the instrument. When acting for Keogh Plans as custodian or trustee, a bank may not be required to have trust powers if the Keogh Plans being administered are in accord with the provisions of Section 333.101(b) of the Corporation's Rules and Regulations.

D. INDIVIDUAL RETIREMENT ACCOUNTS

Individual Retirement Accounts (IRA's) are tax deductible as to contributions, and tax deferred as to earned income until the individual begins retirement withdrawals which may commence upon attainment of age 59 1/2 but must begin by the end of the calendar year in which the individual attains age 70 1/2. Tax qualification for IRA's is achieved pursuant to Section 408 of the Internal Revenue Code. IRA's were created under provisions of ERISA and subsequent tax law changes have liberalized their availability and the amounts that may be contributed annually. The majority of IRA's serviced by banks are handled in the commercial department in a custodial capacity. Banks that administer these accounts in the commercial department are not required to

have Corporation consent to exercise trust powers as long as the bank's functions with respect to the accounts are ministerial or custodial in nature, investments are confined to own-bank deposits or are made at the direction and upon the responsibility of the customer and the bank's acceptance of such accounts is not contrary to State law. (Refer to Section 333.101(b) of the Corporation's Rules and Regulations.)

Some banks have elected to have IRA's administered in their trust departments, particularly in instances where an IRA Rollover account has been established and the original investments include alternative investments or the customer desires to invest in a variety of alternative media (stocks, bonds, mutual funds, etc.). In most cases these accounts are subject to the investment direction of the individual or, possibly, the instructions of an investment advisor. However, the trust department may be given full discretion in the investment selection process. Whether acting as trustee or custodian and whether account administration is performed by the trust department or by the commercial department, the bank's duties and responsibilities will be controlled by the terms of the instrument establishing the relationship. It is essential that a careful review of this documentation be made during an examination to ascertain the degree of responsibility assumed by the bank. Likewise, thoughtful attention should be accorded the bank's procedures and practices to determine the degree of conformity or nonconformity with the duties imposed on the institution under the agreement. In those cases where the commercial department is handling IRA's subject to account holder investment directions, the examiner should ascertain that proper authorities exist in the instrument for the customer, or his advisor, to direct investments and that the bank has established proper controls to assure protection of the assets of these accounts.

E. SELF-ADMINISTERED BANK EMPLOYEE BENEFIT TRUSTS

If the bank establishes a plan or plans to provide retirement or other benefits for its employees and has fiduciary powers, the board of directors has a choice of appointing the bank as trustee and/or in some other fiduciary capacity in relationship to the plan(s). While such trust(s) are in theory no different from any other fiduciary account

served by the bank's trust department, the self-interest of bank management and all eligible employee/participants presents a situation which merits special examiner consideration.

It is a generally accepted trust principle that a fiduciary (bank or individual) has a clear moral responsibility as well as a legal duty, not to deal with itself in the administration of its fiduciary accounts. Because of the nature of own-bank sponsored employee benefit plan trust, the trustee bank must seek ways to preclude the possibility of legal and moral charges that its self-interest dominated its integrity in the administration of plans sponsored for the benefit of its employees. The trust agreement should be carefully drawn and contain explicit provisions covering all aspects of actual and potential areas involving a conflict of interest. If it is anticipated that all or part of the plan's assets will be invested in direct or indirect obligations of the bank or interests of the bank or its directors, officers, employees and certain shareholders, the agreement will have to contain specific authorizing language. Even with specific authority to invest plan funds in the bank's own deposit obligations or stock or that of a parent organization or affiliate, the propriety of this action will be subject to close scrutiny. As qualified plans, such investments will be subject to the governing provisions of ERISA. Section 407 of ERISA specifically limits the portion of defined benefit pension plan assets that may be invested in "qualifying employer securities" and "qualifying employer real estate". However, the plan and trust documents of defined contribution plan accounts may specifically authorize the holding of greater proportions of such assets in these plans. Section 408(b)(4) of ERISA specifically permits the investment of bank sponsored plan funds in its time deposits if they bear a reasonable rate of interest. Investment of bank sponsored plan funds in its time deposits if they bear a reasonable rate of interest. Investment of pension plan funds in own-bank stock or real estate should be carefully analyzed and evaluated for possible self-dealing and the possibility that other provisions of ERISA related to the performance of fiduciary responsibilities have not been violated. Similarly, a careful investigation must be made where such assets as stock, real estate, deposits, etc., comprise a sizeable portion of the plan's assets to assure these investments are within the parameters of plan authority, not in contravention of risk

diversification requirements, and are otherwise in conformity with solid fiduciary principles.

F. ERISA: A GENERAL DISCUSSION

Since 1974, employee benefit trust plan administration has been largely pre-empted by Federal laws and regulations pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). Two government agencies are primarily responsible for administration and enforcement of ERISA: the Internal Revenue Service (IRS) and the Department of Labor (DOL). ERISA also established the Pension Benefit Guaranty Corporation (PBGC), which insures participants' and beneficiaries' interest in defined benefit pension plans to a maximum monthly benefit. PBGC also acts as trustee and receiver for pension plans voluntarily terminated by their sponsors or involuntarily terminated by their sponsors or involuntarily terminated because of the failure of the sponsor for financial or other reasons. All defined benefit pension plans meeting certain requirements must, under ERISA, belong to PBGC and make required annual premium payments.

The primary objective of ERISA is to protect the rights and interests of participants and their beneficiaries. Plans and accounts subject to ERISA are required to contain certain data and be properly administered in an arms-length manner. Disclosures must be made to employees, beneficiaries and sponsors, and fiduciaries must meet government reporting requirements. Banks which sponsor or administer plans subject to ERISA are subject to fines for mismanagement. Therefore, it is important that a bank or trust company have special expertise, policies and procedures appropriate for any type of employee benefit trust account if administers.

The Corporation has a special role in enforcement of ERISA because a trustee bank subject to examination by State and Federal agencies is presumptively qualified under ERISA to act as trustee and is granted certain exemptions from otherwise prohibited transactions. Federal banking agencies have entered into an agreement with the Department of Labor whereby violations of ERISA meeting certain specific criteria will be referred to that agency. The Department of Labor in turn is obligated by law to refer certain matters to the Internal Revenue Service. The agreement

calls for two types of ERISA violations to be referred; (1) "significant" violations of Section 404, and (2) where there is a major threat of loss to the plan and its participants under Section 406 and 407(a). A "significant" Section 404 violation is one amounting to \$100,000 or more and involving the exclusive-purpose test, prudent man rule, or investment diversification. Section 406 deals with party-in-interest transactions as defined. Section 407(a) deals with investments in employer securities and employer real estate. In addition, for the bank's own plan or where the bank acts as "plan administrator", major violations of the reporting and disclosure requirements of ERISA are to be referred.

Violations of ERISA should be scheduled in the report of examination on separate pages apart from other violations, and include the following information:

(1) Full identification. Indicate account number (if any), name and type of plan. Identify all corporate accounts clearly; violations of individual or partnership accounts under the Right to Financial Privacy Act cannot be referred; (2) Size of account (total assets). Indicate whether book or market value, market value is preferable; (3) Size and description of transaction(s) involved, together with the section(s) of ERISA apparently violated; (4) Size of potential or sustained loss to the account (if ascertainable); (5) Whether the bank acts as plan administrator or provides such services; (6) Corrective action taken or to be taken by the bank, if any; and (7) Any specific recommendations by the examiner (obtain legal opinions, Department of Labor opinions/exemptions, etc.), if any.

During any discussion of an apparent ERISA violation, the examiner should remind bank management of the Corporation's referral agreement with the Department of Labor. Examiners should not give an indication whether the violation will actually be referred to the Department of Labor or that such recommendation is being made. The recommendation regarding referral should be made on Page A of the Confidential Section of the report of examination.

In those instances where the Regional Office believes violations schedule in the trust report of

examination may fall within the agreement guidelines for referral to the Department of Labor, a brief memorandum to alert the Washington Review Section should be prepared. The memorandum need only contain the name and location of the bank, with a statement that a possible ERISA violation for referral is contained in the report of examination. If a violation of ERISA is scheduled in a commercial report of examination, a similar type memorandum should be prepared.

Banks which have ERISA violations will not be notified the violation has been referred to the Department of Labor since the Corporation does not know what course of action that agency might take. The Regional Office will be informed of any referrals by the Washington Review Section. Because of the effect of ERISA on the administration of employee benefit accounts, an employee benefit checklist and a summary of ERISA have been included in this Manual under Appendix B and Appendix C. respectively.

G. EXAMINATION PROCEDURES

The examination of employee benefit accounts should determine that the bank's policies, practices and controls governing administration of employee benefit accounts are specifically geared to ensure compliance with the provisions of ERISA. The examiner should determine that necessary steps have been taken to protect the bank from liability related to ERISA matters, and any violations, weaknesses and deficiencies are to be corrected. For purposes of account reviews, an employee benefit account line sheet is included in Appendix B. of this Manual.

One aspect of employee benefit account administration that merits special examiner attention relates to "directed" accounts. ERISA provides statutory protection from liability for trustees who follow the directions of an "investment manager," as defined in Section 3(38), or of a plan participant who is properly authorized in the plan instrument(s) to instruct the trustee in the investment of plan funds. For example, many plans permit the sponsor (employer) or the plan administrative body to appoint an investment manager or managers who are authorized to direct the trustee in the selection of trust investments. Where a duly qualified "investment manager" has been

appointed, Section 405(c) of ERISA affords the trustee substantive protections in following the investment manager's directions. Some plans include provisions authorizing each plan participant, at his or her election, to direct investment of funds allocated to their account. In these cases Section 404(c) affords protection to plan fiduciaries, including the trustee. However, it is not uncommon for the plan document(s) to permit the employer, plan administrator, or plan administrative committee to instruct the trustee to retain or dispose of specific trust assets at their option. Some plans specifically require that the employer or the plan administrative body direct all investments. Thus, examiners will frequently find it necessary to determine whether investment selection by an outside party is merely permissive or is required by terms of the plan and trust instrument(s). In any of these cases, the trustee should insist that all "directions" received from a participant, investment manager, employer, or plan administrative body relative to investment purchases or sales be in writing, whether or not the plan/trust instruments require such documentation. In any case where the plan documents require that investment instructions, or any other instructions, from outside parties to the trustee be in writing, a trustee's failure to obtain such documentation would constitute a violation of Section 404(a)(1)(D) of ERISA (refer to Appendix C-5).

Because of the statutory protections afforded "directed" trustees under ERISA, many trust managers have taken a position that as long as they faithfully follow the instructions of an outside party who is duly authorized to select investments, the bank is fully protected. This is not, however, the situation in all instances. In any case where the trustee follows instructions of an outside fiduciary which violate the prohibited transaction provisions of Section 406 or the limitation provisions relative to holdings of employer securities or real property of Section 407 of ERISA, the trustee would be equally liable with the co-fiduciary. In instances where the employer or plan administrative body instructing the trustee failed to adhere to the prudence standards prescribed in Section 404(a)(1)(B), did not diversify plan investments as required by Section 404(a)(1)(C), or failed to act in accord with the documents and instruments governing the plan as prescribed by Section 404(a)(1)(D) of ERISA, the trustee would be exposed to liability as

a co-fiduciary under Section 405 of ERISA in accepting and acting upon such instructions. Trustees should conduct reviews of "directed" employee benefit accounts to assure that their administrative procedures are in concert with the plan and trust provisions. Although the bank would have no responsibility with regard to the quality of investments selected by an investment manager or a plan participant, such would not appear to be the case where investment selection authority resides with the employer or plan administrative committee. While in the former instances trustees should review investments chosen by the investment manager only to protect against contraventions of ERISA, a more stringent review procedure apparently should be applied where investments are chosen by other fiduciaries. In these instances the bank should act with a view to protecting against statutory infractions and to guarding the bank against exposure by reason of improper acts of co-fiduciaries.